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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 712

JOHN P. NICK AND CLYDE A. WESTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 915) is reported in 122 F. (2d) 660.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 30, 1941 (R. 937), and petition for rehearing was denied on October 1, 1941 (R. 957). Petition for a writ of certiorari was filed October 22, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judical Code, as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

QUESTIONS PRESENTED

(1) Whether the action of labor union representatives in obtaining, by coercion, money for their own personal use in consideration for betraying the interests of the union members whom they assume to represent constitutes "lawfully carrying out the legitimate objects" of a labor organization within the meaning of the proviso to section 6 of the Anti-Racketeering Act.

(2) Whether money obtained from motion-picture exhibitors under threat of calling a strike which would interrupt the interstate flow of films to these exhibitors is money obtained "in connection with * * * any act * * * affecting [interstate] trade or commerce" within the meaning of section 2 of the Anti-Racketeering Act.

(3) Whether a statute which makes it criminal for a labor union representative to extort, during the course of wage negotiations, money for his own personal use violates the First, Fifth, or Tenth Amendment.

(4) Whether the district court erred in its rulings on the admission of evidence or in its charge to the jury.

STATUTE INVOLVED

The Act of June 18, 1934, 48 Stat. 979, 18 U. S. C., sec. 420 (a) *et seq.*, provides in part as follows:

> That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.
>
> SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

SEC. 3. (a) As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

* * * * *

SEC. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided,* That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

STATEMENT

Petitioners were convicted under the first 11 counts of an indictment, each of which charged violation of the Act of June 18, 1934, known as the Anti-Racketeering Act. They were acquitted under a 12th count charging violation of the Sherman Act. Each petitioner was sentenced to five years' imprisonment under each of the first 11 counts, the sentences to run concurrently, and each was also fined $10,000 under count 1 (R. 859, 861). On appeal, the Circuit Court of Appeals for the Eighth Circuit affirmed the convictions.

The first five counts are concerned with the acts by which petitioners obtained a cash payment of $6,500 from an association of St. Louis motion-picture exhibitors in connection with signing a contract covering wage rates for employees of these exhibitors for the year beginning September 1, 1937.[1] The next five counts deal with the coerced payment of money by St. Louis exhibitors to a corporation providing service for sound equipment which petitioners had organized and in the profits of which they shared.[2] The 11th count relates to petitioners' extortion, in 1937, of $2,000 from the owners and operators of the Orpheum Theatre in St. Louis.

Since petitioners' sentences run concurrently and the judgments of conviction must be affirmed if the convictions under count 1 are valid (*United States* v. *Trenton Potteries Co.*, 273

[1] Count 1 charges a conspiracy to obtain money by force, violence, and coercion; count 3 charges obtaining money by such means; count 4 charges an attempt to obtain money by such means; count 2 charges a conspiracy to obtain the property of another, with his consent, induced by wrongful use of force and fear; count 5 charges obtaining such property in this manner (R. 14–40).

[2] Count 6, like count 1, charges a conspiracy to do acts prohibited by section 2 (a); counts 8 and 9, like counts 3 and 4, charge violations of section 2 (a); count 7, like count 2, charges a conspiracy to do acts prohibited by section 2 (b); count 10, like count 5, charges violation of section 2 (b) (R. 40–53).

U. S. 392, 401–402), we shall limit our statement to the conspiracy charged in count 1.[3]

The charge in the first count is that there is a continuous interstate movement of films in and out of St. Louis (R. 16–18); that the sole objective of this interstate movement is local exhibition and any interference therewith would directly affect and curtail the interstate flow of films (R. 17, 19–20); that exhibition of films in theatres requires the operation of projection machines by skilled employees referred to as operators (R. 18); that substantially all operators in St. Louis are members of Local 143 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, referred to herein as IATSE (R. 18); that petitioners conspired to obtain money from St. Louis exhibitors by using and threatening to use force, violence, and coercion, and, as a part of this conspiracy, (a) obtained control of Local 143, (b) made excessive, arbitrary, and bogus demands for wage increases for operators employed by St. Louis exhibitors, (c) threatened strikes of the operators if petitioners' demands were not met, and (d) intimidated the exhibitors by surrounding themselves and the headquarters of Local 143 with men of known bad reputation, vicious disposition, and known criminal records,—all for the purpose not of securing wage increases or better working conditions for the operators but for the purpose of coercing the exhibitors to pay money to petitioners for "their personal use and profit" (R. 20–21, 23).

The evidence fully substantiates these averments. The continuous interstate movement of films shipped to and from the film exchanges which motion-picture distributors maintain in St. Louis and the effect which a stoppage of local exhibition

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[3] The court below likewise confined its discussion to count 1 except where disposition of a particular assignment of error required consideration of some other count (R. 916).

would have upon this movement are established by uncontradicted evidence.[4] There was likewise evidence that during the indictment period St. Louis theatres were 100% organized (R. 133, 160), that only members of Local 143, or members of IATSE having the permission of Local 143, could work as operators in St. Louis (R. 133, 214), and that a strike by Local 143 would force motion-picture theatres in St. Louis to close (R. 330, 350, 351).

The evidence that petitioners completely dominated the affairs of Local 143 is detailed and overwhelming. Petitioner Nick, first vice-president of IATSE, was placed in complete charge of the affairs of Local 143 by George E. Browne, president of IATSE, in 1935.[5] Browne informed the membership that Nick's orders were to be obeyed the same as if he, Browne, had issued them and that any member refusing to obey Nick would be suspended (R. 133, 223). Nick, upon taking charge of the affairs of the Local, advised its members that anyone who violated his orders or who attempted to go over Nick's head would have his union card torn up (R. 130, 133).[6] Upon Nick's assumption of control, the officers of Local 143 resigned (R. 129), elections were omitted (R. 134), and the executive board of the Local was abolished (R. 140, 141, 796). About 63 men were made members by Nick without vote of the membership, including two of Nick's chauffeurs and others who were not qualified operators (R. 141, 147).

For a number of years prior to 1935 petitioner Weston had been a representative of IATSE sent out on special assignments by it (R. 133). When Nick took over control of Local 143 in July 1935 he told the members that Weston would be

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[4] R. 107–112, 115, 117–120, 126–128, 572; Govt. Ex. 8, par. 13, R. 221. A part of this evidence is summarized in the opinion of the court below (R. 918).

[5] R. 129, 133; Def. Ex. 38, R. 661, 663. While the court stenographer, in reporting the oral testimony, spelled the president's name "Brown", the correct spelling, as shown by the documentary evidence (Def. Ex. 5, p. 5, R. 717; Def. Ex. 38, R. 661), is "Browne".

[6] Without a union card, an operator could not work in St. Louis (R. 133, 231, 508).

in charge of the Local and that an order issued by Weston would be the same as one issued by Nick (R. 130). From October 1935 to January 1937 one Tomsen was business manager of the Local, but in January 1937 Nick ousted Tomsen and sent the members a written notice stating that Weston would be business manager and that he would be "my personal representative and handle all affairs of Local 143, until further notice" (R. 136, 206; Govt. Ex. 5, R. 137).

There was likewise clear and convincing evidence establishing what was referred to in the testimony as the 1937 "pay-off".

The Motion Picture Theatre Owners of St. Louis, Eastern Missouri and Southern Illinois is an association of subsequent-run theatres in the territory indicated by the Association's name (R. 241). The Association annually negotiated on behalf of its members an agreement with Local 143 covering a one-year period beginning September 1 (*ibid.*). In the negotiations for an agreement for the year beginning September 1, 1936, Nick and Tomsen represented Local 143 but at the last minute Tomsen was dropped and the final agreement was made by Nick alone (R. 135–136, 341–342). The union had demanded an increase in wages; but during the negotiations one Edward M. Brady [7] told the exhibitors' committee that, for a cash payment, he could obtain a contract "like we had the year before" (R. 244–246). The exhibitors finally agreed to pay him $10,000 for a renewal of the old contract without any increase in wages, and on the day that such a contract was signed they paid Brady $10,000 in cash (R. 244–247, 341–345; Govt. Ex. 12, R. 343).

In the contract negotiations for the year beginning September 1, 1937, petitioners represented Local 143 and a committee of the Association represented the exhibitors (R. 247–248, 358). At the first meeting petitioners demanded a wage scale which

[7] Edward M. Brady, known as "Putty Nose" Brady (R. 142, 246, 341), was not a member of Local 143 (R. 142) but claimed to be a representative of Browne (R. 244–246).

constituted a 75% increase, from $40 to $70 a week, for operators in Class "D" theatres and smaller percentage increases for theatres falling in higher classifications (R. 248–251). A majority of the theatres represented by the Association were Class "D" houses and adoption of the proposed wage scale would have forced the smaller theatres to close, and petitioners were so advised (R. 251, 254, 318, 345, 362). When petitioners persisted in their demands, the exhibitors gained the impression that the demands were not made in good faith but were the stage setting for a shakedown or pay-off.[8] Weston finally informed a member of the exhibitors' committee that if paid $10,000 he would help in getting them a satisfactory contract (R. 322–323, 325). After Weston had agreed to accept $7,500, the exhibitors, who were confronted with what they considered to be an impossible wage contract or a strike, undertook to collect this sum from their members and by November 24 had collected $6,500 (R. 326–335). After the understanding for a pay-off had been reached the attitude of petitioners, which had been arrogant up to that time, completely changed (R. 352, 356, 358–359).

On November 24, 1937, the day before Thanksgiving, Weston telephoned one of the committee members and said: "I am kind of getting tired getting kicked around with this contract * * *. If the contract is not signed today, there will be no operators tomorrow, I will pull the operators" (R. 270). The three committee members engaged in making collections were then hurriedly assembled, met Weston at a bank and turned over to him $6,500 in bills of small denominations and he then delivered a wage contract signed by Nick (R. 270–274, 333–337, 350–352). While this contract provided for slightly higher wages, it increased working hours so that the net effect, although slight, was to lower the earnings of the operators (R. 234, 320, 351, 794, 795, 797).[9]

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[8] R. 254, 259–260, 261–263, 267–269, 320–322, 345–348, 356.

[9] Petitioners' brief (p. 26) characterizes the pay-off as "a bonus or as a good-will offering as insurance against higher wages for their employees."

On the first business day following the pay-off Weston delivered $2,500 in cash to a real estate company in part payment of a loan extended to him to finance a house he was building (R. 511–512, 518; Govt. Ex. 19, p. 3, R. 517).

At a banquet held to "celebrate" the signing of the 1937 contract Nick in a speech to the members of Local 143 told them that the contract was "signed, sealed and delivered", that whether they liked it or not they were "going to have to like it" (R. 235, 793, 797, 801, 802).

It was not until some time after January 1939 that the members of Local 143 got back control of their own union and succeeded in ousting petitioners, and then only by virtue of an equity proceeding in the Circuit Court of St. Louis (R. 226–227).

ARGUMENT

I

Petitioners contend (pp. 11–12) that the decision below is in conflict with *United States* v. *Local 807*, 118 F. (2d) 684 (C. C. A. 2), certiorari granted, Nos. 131–132 present Term, October 13, 1941. The court there held that where a person who has made a proffer of service which was not accepted obtains money by force or violence, the money so obtained is within the clause of the Anti-Racketeering Act exempting "wages paid by a bona-fide employer to a bona-fide employee". But petitioners not only never were, they never even sought to become, employees of the St. Louis exhibitors. The holding in *United States* v. *Local 807* has therefore no application whatever to the present case.

Grant of certiorari in the instant case would not present any question of statutory construction which is or may be before this Court in the *Local 807* case. In that case this Court may find it necessary to determine whether members of a labor union who obtain money as the price for abstaining from violent interference with interstate operations are "lawfully carrying out the legitimate objects" of a bona-fide labor organization.

within the meaning of the proviso of section 6 of the act. This proviso has no application to the present case, unless it can be said that acceptance of bribes by labor-union officials in consideration for selling out the interests of the union members whom the officials represent constitutes "lawfully carrying out the legitimate objects" of a labor organization. To advance such a construction of the statute is, as the court below said (R. 935), "an astonishing proposition," since the construction converts a proviso enacted for labor's protection into a shield for those engaged in betraying labor. The court below said (R. 935):

> Obviously, the only purpose or possible reason for employers bribing such racketeers in connection with wage negotiations is to secure lower wages than honest negotiations would probably produce. How such a situation can possibly result in anything but harm to the innocent members of the labor organization is not clear. * * *

II

Petitioners urge (p. 13) that the decision below is in conflict with *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and *United States* v. *Hutcheson*, 312 U. S. 219. The apparent basis for the contention (petition, pp. 30–31, 36, 39) is that these cases establish as a general principle of law that interference with interstate commerce can never give rise to a cause of action against a labor union or a representative thereof (at least unless commercial competition is curtailed). It is scarcely necessary to point out that these cases represent merely a construction of particular statutory provisions and that they do not lay down any principle of law of the kind suggested, to be applied to any and all federal legislation. Indeed, the *Apex* case itself points out the difference in policy between the Sherman Act and the Anti-Racketeering Act. 310 U. S., at 491–493.

Petitioners' contention (pp. 31–32) that, in the absence of proof that their conduct resulted in some actual stoppage

or diminution of interstate commerce, the jury's verdict was without support in the proof seems to be based upon the view that in these circumstances there was no evidence of extortion "in connection with or in relation to any act * * * affecting [interstate] trade or commerce." The question of statutory construction thus raised is, we submit, without substance. When petitioners forced the exhibitors to choose between paying them a bribe and having the interstate movement of films to exhibitors brought to an end by a strike closing their theatres, their act in threatening a strike indubitably was an act "affecting" interstate commerce and the $6,500 which they thereupon received indubitably was obtained "in connection with" such act. Decisions under the National Labor Relations Act show that conduct which leads or tends to lead to a labor dispute obstructing the free flow of commerce is conduct "affecting" interstate commerce irrespective of whether commerce has been obstructed in the particular case. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221–222. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 43. Here the proof showed not merely conduct which *tended* to cause obstruction but conduct which directly threatened immediate obstruction.

III

Petitioners contend that the Anti-Racketeering Act as applied in this case is unconstitutional.

They urge (pp. 20–21) that under the holding in *Thornhill* v. *Alabama*, 310 U. S. 88, the Act violates the First Amendment. We submit that nothing in that decision even remotely suggests that there is any infringement of the constitutional guarantee of freedom of speech when Congress makes it a crime for a labor representative to extort money for his own personal use, by betraying those whom he assumes to represent. Extortion is not protected by the First Amendment whenever threats are delivered by word of mouth.

Petitioners' contention (pp. 21–22) that the statute violates the Tenth Amendment is, we submit, equally without merit That amendment merely states the truism that all powers not surrendered to the national Government are retained by the States; it becomes operative only if and when it appears that Congress, in a particular exercise of power, has exceeded the powers delegated to it by the Constitution. *United States* v. *Darby*, 312 U. S. 100, 123–124. Under the *Darby* case and under decisions upholding the National Labor Relations Act,[10] it cannot be doubted that the Anti-Racketeering Act is a valid exercise of the commerce power of Congress. Nor can there be any question as to the validity of the Act as here applied. For practices which interrupt the flow of film from distributors to exhibitors have frequently been held to restrain and obstruct interstate commerce. *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 309–311; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208.

Petitioners' contention (pp. 22–23) that the statute violates the Fifth Amendment is, we submit, likewise unsound. The fact that the same conduct may be an offense against both the United States and against a State does not constitute double jeopardy within the Fifth Amendment. *United States* v *Lanza*, 260 U. S. 377, 382–384; *McKelvey* v. *United States*, 260 U. S. 353, 358–359.

IV

Petitioners contend that the district court erred in its admission of evidence, in its instructions to the jury, and in its refusal to give requested instructions. They also assert that the verdict is inconsistent. These alleged errors raise no question which warrants review by this Court. We submit, moreover, that the questions raised present no ground for reversal.

1. The alleged erroneous rulings as to evidence are carefully considered in the opinion of the court below (R. 928–933).

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[10] Cf., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

We deem it unnecessary to supplement the court's discussion except to cite authority for the settled rule that a witness may testify as to statements made by a third person where, as in this case, the testimony is admitted, not in proof of the facts stated, but to show the state of mind of the person making the statement.[11]

2. The opinion below likewise discusses fully the alleged errors in the district court's charge to the jury (R. 934–936). We merely add minor comments called for by the brief in support of the petition for certiorari. Petitioners lay great stress (Br. pp. 41, 43) on a statement in the record as transcribed which the court reporter subsequently swore to be incorrect,[12] and on an obvious slip of the tongue by the judge which in its context (R. 839) would not have misled the jury, and which was corrected when called to the court's attention (R. 846).[13] The excerpt from the charge (R. 824) set forth at the bottom of page 36 is incorrectly quoted in a manner which makes it not entirely intelligible. Petitioner also criticizes (Br. p. 39) as an unfair construction of the Anti-Racketeering Act a sentence which in its context can be seen to be only an accurate description of what constitutes an overt act under the conspiracy statute.[14]

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[11] *Wigmore*, Evidence (3d ed.), sec. 1790; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 295–300. See also *Wigmore*, Evidence (3d ed.), secs. 1766, 1788.

[12] Petitioners assert that the court charged the jury to "vote for a conviction" (R. 843). In an affidavit subsequently filed, the court reporter stated that a re-examination of his shorthand notes showed that the expression should have been transcribed as "vote for your conviction" (R. 850–852). This correction is borne out both by a statement by the judge (R. 852) and by the context of the remark (R. 843).

[13] The record shows that after charging the jury that presumption of innocence continues with the defendant and entitled him to an acquittal unless the jury is convinced beyond a reasonable doubt of his guilt, the court stated, "Unless the Government has proven guilt beyond a reasonable doubt, a conviction must result" (R. 839).

[14] At the end of the second paragraph on R. 823 the court defined the offense of conspiracy as consisting of "the forming of a plan to commit an unlawful act and the advancement of such a plan * * * by some act of one or more of the conspirators. The making of a threat or the receipt of money would consitute such an act." Petitioners treat the last sentence as if it applied to the Anti-Racketeering Act generally.

3. Petitioners are not in a position to raise the question of error in the denial of their requested instructions to the jury since in the court below they did not give any specification of such error (R. 933).

4. Petitioners contend (p. 44) that the verdicts of conviction under the Anti-Racketeering Act and of acquittal under the Sherman Act are inconsistent. Not only is there patently no inconsistency (R. 936–937), but inconsistency in the verdict of a jury is not a ground for reversal. *Dunn* v. *United States*, 284 U. S. 390; *United States* v. *General Motors Corp.*, 121 F. (2d) 376, 411 (C. C. A. 7th), certiorari denied, No. 352 present Term, October 13, 1941.

CONCLUSION

The decision below is clearly correct and is not in conflict with any applicable decision of this Court or of another Circuit Court of Appeals. The questions of statutory construction and of constitutionality which petitioners seek to raise are without substance. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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NOVEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941